[2014] UKUT 0280 (TCC)
Appeal number: FTC/46/2013

VAT – input tax recoverability – s 26 VATA – reg 103 VAT Regulations – whether certain activities of appellant would be taxable supplies if made in the UK – whether supplies made for a consideration – art 2, Principal VAT Directive – Apple and Pear; Tolsma – whether appellant acting as a taxable person – economic activity – art 9, Principal VAT Directive

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SOUTH AFRICAN TOURIST BOARD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: THE HON MRS JUSTICE ROSE
JUDGE ROGER BERNER

Sitting in public at The Rolls Building, Fetter Lane, London EC4 on 6 – 7 May 2014

Melanie Hall QC and Frank Mitchell, instructed by VATit UK Limited, for the Appellant

Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of the South African Tourist Board ("SATB") against the decision of the First-tier Tribunal (Judge Mosedale and Ms Hunter) ("FTT") released on 13 December 2012, [2013] SFTD 508. By that decision the FTT dismissed SATB's appeal against a decision of HMRC that 95% (later revised to 85%) of the VAT incurred on supplies to it was irrecoverable on the ground that SATB's activities are not, to that extent, business activities.

2. SATB is a statutory body established by South African domestic legislation, the Tourism Act 1993 ("Tourism Act"). It has a UK branch and is registered for VAT in the UK. It exists to promote South Africa as a tourist destination. In that connection it incurs UK VAT on supplies to it. The question in this appeal is whether it is entitled, by virtue of section 26 of the Value Added Tax Act 1994 ("VATA") and regulation 103 of the Value Added Tax Regulations 1995, to recover 100% of that input tax. That depends on whether that input tax is used in the making of supplies outside the UK which would be taxable supplies if made in the UK.

3. SATB carries on a number of activities in pursuit of its objective to promote South African tourism. To a large extent it is funded by the South African Government. It was that relationship, governed by an agreement ("the Performance Agreement") between SATB and the Government, that gave rise to the dispute in this appeal.

4. The core issues before the FTT were set out in an agreed list of issues as follows:

> (a) Whether and the extent to which SATB is making supplies of marketing services to the South African Government which would be taxable supplies if made in the UK (SATB's case).
>
> (b) Whether SATB is (predominantly) not making taxable supplies to the South African Government in the circumstances of this case, in particular whether it is a statutory body carrying out its statutory duties and receives grant funding rather than consideration for taxable supplies (HMRC's case).
>
> (c) If HMRC are right that SATB's supplies are not wholly taxable, whether they are right to conclude that 15% of the VAT incurred was input tax attributable to taxable supplies and 85% was attributable to non-taxable supplies or whether that apportionment should be altered.

5. The FTT concluded that SATB was not making taxable supplies to the South African Government, for the following reasons, both of which individually would have disposed of SATB's appeal:

(1) SATB was not a taxable person acting as such when receiving Government funding to carry out its statutory duties as detailed in the Performance Agreement.

(2) SATB was not making supplies for consideration, and there was no "direct link" between the supplies and the consideration.

6. On the question of the appropriate level of input tax recovery, the FTT decided in principle that joint marketing initiatives, in which SATB was paid by a business partner to promote South Africa in connection with the business of that partner could, where SATB made an onward supply to its partner, be a supply for a consideration made by SATB as a taxable person acting as such. The same analysis operated in respect of incidental activities. But in one specific case, concerning levies paid to the Tourism Business Council of South Africa ("TBCSA") by certain tourist providers and by TBCSA to SATB to be applied towards the marketing of South Africa, the FTT decided that SATB did not make supplies for a consideration.

The facts

Constitution and financial accounting of SATB

7. SATB is a statutory body established by the Tourism Act to promote tourism in South Africa. Section 3 of the Tourism Act sets out the objects of the SATB. As amended by the Tourism Act 1996, those objects are, having due regard to the sustainability of environmental resources, taking measures to attempt to ensure that services rendered and facilities made available to tourists comply with the highest standards, managing information and conducting research relating to tourism, and advising the relevant Minister on tourism policy.

8. The FTT found that SATB could pursue no objectives outside its statutory objectives. It found that the only sensible interpretation of the Tourism Act was that SATB had a duty to promote tourism in South Africa. As long as it had the necessary resources (see below: *Funding of SATB*), it was compelled to use those resources to promote South Africa as a tourist destination in accordance with the Act.

9. The Tourism Act sets out the powers of SATB in s 13. Most of those powers are exercisable independently of the South African Government or Ministers. Certain powers, including the entry into agreements for the promotion of tourism with other bodies, require the consent of the Minister but the FTT found that in practice such consent for particular contracts was not always sought. The FTT found that SATB acted with considerable independence from the South African Department of Environmental Affairs and Tourism ("the Department").

10. The Tourism Act contains provisions for the constitution of the board of SATB, their period of office, committees of the board, and remuneration. Section 14 deals with financial accountability, requiring annual financial statements of money received and expenditure incurred and assets and liabilities to be audited by the Auditor-General. Section 15 requires an annual report of SATB's affairs and activities during the preceding financial year to be submitted to the Minister. Under the Public

Finance Management Act 1999 ("PFMA"), SATB is required to maintain adequate accounting records and to produce externally audited financial statements in accordance with South Africa's GAAP.

Funding of SATB

11. Section 16 of the Tourism Act provides that the sources of SATB's funds are money appropriated by Parliament for the purpose, income "derived in terms of the provisions of [the] Act" and donations or contributions received by SATB from any source. SATB is required, under s 16(2), to use its funds to defray expenditure incurred in connection with the exercise of its powers, performance of its functions and the carrying out of its duties in accordance with a statement of estimated income and expenditure approved for each financial year by the Minister (with the concurrence of the Minister of State Expenditure). SATB's expenditure must not exceed the total amount approved (s 16(3)).

12. The Government grant formed the greater part of the funding of SATB. In an example period of 2005/06, that funding amounted to 80% of the total. Of the remainder, 12% was derived from the TBCSA levy, and the balance from Indaba and other trade shows, interest and foreign exchange and campaign partners. The FTT found that the Government funding was both for operational expenses (such as staff costs) and marketing expenses in paying external providers of marketing services. The FTT found that this was no more than a method of calculating what SATB would need to operate since SATB were not bound under the Tourism Act to use the Government funds for any particular purpose, or as the FTT described it the funds were not "earmarked" for any particular kind of expenditure; that was the effect of s 16(2) of the Act.

Governance Protocol

13. The Governance Protocol For Environmental Affairs and Tourism aims to formalise and standardise governance arrangements between the Department and public entities for which the Minister has oversight, of which SATB is one. Its purpose is to provide guidelines for the operational relationship between the Department and the public entities. The support given by the Department to the Minister is expressed to involve the monitoring and analysis of the planning, budgeting and reporting processes of the entity.

14. The Protocol provides for the entity, in this case SATB, to submit a proposed rolling three-year strategic plan to the Department on 30 September in each year, taking account of Government and, in particular, Departmental priorities. Business plans must be submitted in each financial year, to include key activities and projects, performance indicators, targets and resource implications. Where applicable, entities are required to prepare a revenue generation strategy in respect of revenue to be generated outside national treasury allocations. There is provision for budget planning and for submission by SATB of a final budget within a month after the estimate of national expenditure (ENE) has been finalised. Detailed planning and

reporting requirements are set out, as well as financial performance requirements in accordance with the PFMA.

15. Under the heading "Transfer of Funds" the following provision appears:

> "Transfer of funds shall further be conditional to fulfilment of requirements of the protocol and other requirements as per legislation or agreement between the department and the entity."

16. Ms Hall criticised the failure of the FTT to refer in its decision to the Governance Protocol, which was she submitted the gateway to the Performance Agreement entered into between SATB and the Department. She was especially critical of the failure of the FTT to attach importance to the Transfer of Funds provision which, she argued, provided the gateway to the legal relationship between SATB and the Department containing mutuality of obligation with regard to the funding. These instruments demonstrated, she submitted, that the relationship was not exclusively defined by the Tourism Act. We shall consider Ms Hall's submissions in these respects when we come to the application of the law.

Performance Agreement

17. The FTT found that in each year SATB entered into a very detailed Performance Agreement with the South African Government (in the form of the Department). It found that, although SATB had the power to enter into such an agreement, there was nothing in the Tourism Act that obliged it to do so. The agreement we looked at was for the year 2005/2006, though it was common ground that this was typical of the provisions made in these agreements from year to year.

18. In the Preamble to the agreement, as set out by the FTT, it was recited that the Department had agreed to transfer funds to SATB in accordance with the PFMA. The agreement recorded that SATB would aim to achieve the specified targets, and that under the agreement SATB had an obligation to the Government to achieve its targets for increasing tourism.

19. The objects of the project are dealt with in clause 3 of the agreement. It provides that the project shall, as set out in the business plan, aim to increase the number of tourists and the amount that each tourist spends as indicated in Schedule 1, meet certain targets of the Broad Based Black Empowerment Act 53 of 2004, and meet certain other key objectives in Schedule 1 to the agreement. Clause 4 provides that the project shall attain the targets specified in Schedule 1. Schedule 1 sets out targets and projections of numbers of arrivals from specified countries, average spend per tourist in South Africa and key performance areas, such as improving brand awareness, increasing domestic tourism and "cementing Indaba as one of the three must-visit exhibitions in the world".

20. On funding, clause 5 of the Performance Agreement set out the extent of the Government's funding of the SATB over the forthcoming year and when payment would be received on an instalments basis. Payments are expressed to be subject to SATB satisfactorily meeting its obligations under the agreement. Furthermore, by

clause 5.5, it was agreed that if there were any uncommitted funds available at the end of the duration of the agreement, such funds would be refunded to the Department. Clause 5 also provides for the submission by SATB of a business plan and annual budget for the subsequent year.

21. Renewal of the agreement is dealt with by clause 10. The agreement was renewable on terms and conditions to be agreed upon by the Department and SATB, with SATB being under an obligation to submit a business plan and a budget for the following year. Renewal is also expressed to be subject to a number of conditions, namely the provision by SATB of quarterly reports to enable the Department to monitor progress on targets, availability of funds and no continuing breach by SATB of the agreement.

22. Clause 11 contains provisions relating to breach. Breach by either party can give rise to written notice requiring the breach to be remedied within 15 days. Failure so to remedy a breach is expressed to enable the aggrieved party to claim specific performance or, in the case of material breach, cancel the agreement and claim damages. The project may be cancelled if funds are not utilised by SATB for the project, and the Department may appoint independent consultants to assist SATB to rectify the transgression and take legal action against SATB.

TBCSA levy

23. The FTT found that certain levies, known as TOMSA levies (after Tourism Marketing South Africa, a limited liability company) were voluntary levies on the sale of hotel accommodation and rental cars to tourists which were collected from tourists by those service providers who chose to do so and paid to TBCSA, an organised body of business in tourism and related businesses. TBCSA paid the levies to SATB under a memorandum of understanding.

24. Under the memorandum of understanding SATB aimed to meet a specified target number of tourist arrivals and to comply with certain other obligations, including execution of business plans and budgets. The funding provided by TOMSA and TBCSA was subject to SATB meeting those obligations. The FTT found that SATB was also obliged, under the memorandum of understanding, to favour the TOMSA levy collectors when promoting its tourist services.

25. If funds from the levy were unutilised in a given year, it was provided that those funds be carried forward and applied to marketing activities of SATB in the following financial year.

Cost sharing arrangements

26. In accordance with the power given by the Tourism Act, SATB entered into partnerships with the private sector. The FTT gave an example of what it described as many similar agreements, namely an agreement with Emirates, the airline, which the FTT described as a typical commercial contract. The agreement was to share the costs of promoting Emirates' flights to South Africa. Each party agreed to pay a sum

towards costs of marketing materials. The FTT found that in practice Emirates paid a sum to SATB, and SATB paid for the marketing campaign.

Commercial approach

27. The FTT accepted that SATB was fully commercial and professional in its approach to what it did. There is no challenge to that finding of fact before us.

The law

28. The principal question on the facts of this case is whether the funds received by SATB from the South African Government were consideration for what would have been taxable supplies if they had been made by SATB within the UK. In common with most VAT cases, that gives rise to consideration of both the UK domestic law and the EU law.

29. Section 4(1) VATA provides:

> "VAT shall be charged on any supply of goods or services made in the UK, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."

30. Section 5 VATA makes provision regarding the meaning of supply. Section 5(2) provides:

> "(a) 'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

31. These domestic provisions follow from the UK's implementation of EU directives. The relevant directive for these purposes is the Principal VAT Directive (2006/112/EC) (*Official Journal* 2006 L347 p 1) ("the Principal Directive"), article 2 of which relevantly provides:

> "**Article 2**
>
> The following transactions shall be subject to VAT:
>
> (a) the supply of goods for a consideration within the territory of a Member State by a taxable person acting as such;
>
> …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;
>
> …"

32. Article 9 of the Principal Directive provides the definition of a taxable person:

> " 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

Discussion

33. Although it took the view that the question whether there were "supplies of services for consideration" (art 2(c); s 5(2)(b)) was largely the same as whether there was an "economic activity" (art9; s 4(1)), the FTT considered separately the issues (1) Were there services carried out by SATB on behalf of the South African government supplies for consideration? and (2) Was SATB a taxable person acting as such in carrying out those services?

34. We shall address first the question whether SATB made supplies for a consideration to the South African Government. But we should observe at the outset that we do not agree with the premise of the FTT that the article 2 and article 4 questions are essentially the same. As the Advocate-General (Sir Gordon Slynn) remarked in *Apple and Pear Development Council v Customs and Excise Commissioners* (Case 102/86) [1988] STC 221, at p 232b, although there is a link between the concepts of taxable person and taxable transaction (see *Staatssecretaris van Financiën v Hong Kong Trade Development Council* (Case 89/81) [1982] ECR 1277), and a consideration of one may help in the resolution of the other in any particular case, they are nonetheless distinct concepts. In our view, in this case it is the concept of taxable transaction that is paramount.

Supplies for a consideration

35. In determining for VAT purposes whether something is done for a consideration, it is not to domestic law that we must turn. The expression "consideration" in the Principal Directive, as with the directives that preceded it, has long been recognised as part of EU law, so that the meaning and scope of article 2 does not depend on the laws of the Member States (*Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (Case 154/80) [1981] ECR 445, commonly referred to as the "*Dutch potato case*").

36. The EU law principles on which such a determination must be founded have been clearly expressed in a number of cases. In *Apple and Pear*, the Council was a body established by statutory instrument whose functions related essentially to advertising and the promotion and improvement of the quality of apples and pears grown in England and Wales. Under the statutory instrument the Council imposed on growers a mandatory annual charge in order to finance its activities. The question, referred by the House of Lords to the ECJ, was whether the exercise by the Council of its functions and the imposition of the mandatory annual charge constituted the supply of services by the Council effected for consideration from the growers.

37. In its judgment, the Court referred, at para 11, to the *Dutch potato case* for the principle that, for the provision of services to be taxable within the meaning of the Second Directive, there had to be a direct link between the service provided and the consideration received.

38. In determining whether there was such a direct link between the exercise of its functions by the Council and the payment of the mandatory charges by the growers, the Court considered, at paras 14 and 15, a number of factors: that in so far as the Council was a provider of services, the benefits deriving from those services accrued to the whole industry; any benefits derived by individual growers derived indirectly from those accruing to the industry as a whole; there was no relationship between the level of the benefits individual growers obtained from the services provided by the Council and the amount of the mandatory charges; the charges were imposed by virtue of a statutory, and not a contractual, obligation and were recoverable from each individual grower whether or not a given service of the Council conferred a benefit on him.

39. Taking these factors into account, the Court held, at para 16, that mandatory charges of the kind imposed on the growers did not constitute a consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. The exercise of those functions did not therefore constitute a supply of services effected for consideration.

40. *Apple and Pear* demonstrates that in any particular case there will be likely to be a range of factors to consider and that no one factor is conclusive. Some may point in one direction, some in another. Such was the case in *Apple and Pear*, as appears from the helpful opinion of Advocate General Slynn, beginning at p 234b. On the one hand, the Council could not perform its functions unless the growers paid the levy, the growers paid for what they got and it was likely that the larger growers who paid the most would obtain the greater benefit from the activities of the Council. Further if the Council was to be treated as a taxable person (and the House of Lords considered that it was; see Judgment, para 8), then it could be argued that it was likely that its activities constituted supplies for a consideration.

41. On the other hand were the factors which persuaded the Advocate General, and subsequently the Court, that there was no supply for a consideration. The Council was set up in the interests of the relevant industry as a whole and in the interests of the community as a whole. The purpose of the charge was to enable the Council to meet administrative and other costs to be incurred in the exercise of statutory functions which the Council was statutorily obliged to exercise. Although the fact that the levy was obligatory might not have been conclusive against it being consideration, the absence of any consensual element in the payment and the lack of control by individual growers over what the Council did for them were pointers to the levy not being in any real sense a payment for particular services.

42. Referring at p 234h-j to the *Dutch potato case*, and the need for a direct link in order that the payment should be "for" the services rendered, the Advocate General at p 235a-c expressed the opinion that the payment to the Council was only indirectly for the benefit, if any, received by particular growers. The obligation was to pay towards the Council's expenses of improving the industry; it was not to pay for what was individually received. On that basis, the necessary reciprocity or direct link could not be established.

43. At p 235c-d, Advocate General Slynn also drew attention to the distinction, recognised by the Court of Justice in *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* (Case 15/81) [1982] ECR 1409, at para 14, between a "transaction" necessary for an internal supply under which there is a supply of goods for valuable consideration and the mere importation of goods, which is a chargeable event whether there is a transaction or not, and whether or not the transaction is carried out for valuable consideration. The Advocate General took the view, at p 235e-f, that the obligatory payment of the levy and the obligatory discharge of statutory functions unrelated to individual growers could not constitute the necessary transaction, let alone any form of bargain.

44. In expressing that opinion, the Advocate General drew a distinction between the general levy and a particular scheme – the Kingdom Scheme – which was the precursor to the compulsory scheme considered by the ECJ and which promoted the sale of top quality apples. This was a voluntary scheme which was, apart from an initial government grant, self-financing and under which growers voluntarily paid for services directed to their specific products. The English Court of Appeal had upheld the High Court's conclusion that the services provided by the Council in return for the additional levy from the growers who chose to join the Kingdom scheme were supplies for consideration: see the judgment reported at [1985] STC 383, at p 390. Before the House of Lords, it does not appear that the distinction between the Kingdom Scheme and the general activities of the Council was challenged by HMRC: see the judgment reported at [1986] STC 192. Advocate General Slynn also accepted that the position in relation to the payments under the Kingdom Scheme was very different since the growers were paying voluntarily for services directed to their specific products: see p 235 of his Opinion.

45. The need for reciprocity in order that a direct link between the service and payment received might be established was emphasised in a later case in the ECJ, *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509. In that case, Mr Tolsma played a barrel organ on the public highway in the Netherlands. He solicited voluntary donations from passers by and by knocking at the doors of houses and shops to ask for payment. The question for the Court was whether the service of playing music on the public highway without stipulating for payment, but nevertheless receiving payment, could be regarded as a supply of services effected for consideration.

46. The Court decided that it could not. It held, at para 14, that a supply of services is effected "for consideration" only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. In *Tolsma* there was no agreement between the parties, and no necessary link between the musical service and the payments to which it gave rise. It was irrelevant that Mr Tolsma played his music with a view to receiving payment, and did so. Equally irrelevant was the fact that Mr Tolsma solicited money and expected to receive it. The payments were entirely voluntary and the amount was practically impossible to determine.

47. In his opinion in *Tolsma*, Advocate General Lenz set out, at para 14, a helpful summary of certain criteria that have been developed in the case law around the principle of "contractual exchange" required to establish the element of "consideration":

> "Certain criteria have been developed in the case law to define this principle more closely: there must be a direct link between the service supplied (which in this case would be the music provided) and the consideration received (in this case the payments by passers-by) (see the judgments in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (Case 154/80) [1981] ECR 445 at 454, para 12, *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86) [1988] STC 221 at 237, [1988] ECR 1443 at 1468, para 11, and *Naturally Yours Cosmetics Ltd v Customs and Excise Comrs* (Case 230/87) [1988] STC 879 at 894, [1988] ECR 6365 at 6389, para 11). The link must be such that a relationship can be established between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration (see the *Apple and Pear Development Council* judgment [1988] STC 221 at 238, [1988] ECR 1443 at 1468, para 15). The consideration must be capable of being expressed in money (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, para 13), and the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 894, [1988] ECR 6365 at 6390, para 16). It must be a subjective value (see para 23 below), since the taxable amount is the consideration actually received and not a value estimated according to objective criteria. A service for which no subjective consideration is received is consequently not a service 'for consideration' (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, paras 10, 11), the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 886, [1988] ECR 6365 at 6390, para 16)."

48. These are the principles that fall to be applied to the facts of any particular case. It is, as we have described, a question of analysis of the entire circumstances of the case, weighing the various competing factors.

49. It follows that we reject the submission of Mr Singh, for HMRC, that the finding of the FTT that SATB had a duty under the Tourism Act to promote South African tourism is fatal to SATB's case. Mr Singh argued, as he had before the FTT, that the existence of such a duty had the effect that there could be no consensual element in the relationship between the South African Government and SATB or even between the SATB and anyone else. HMRC's case was that because all SATB's promotional activities were undertaken pursuant to its statutory objectives and duties, it could not be described as consensually providing its services to anyone else. Thus HMRC did not agree with the FTT's conclusion that SATB's supplies to partners such as the Emirates airline were for a consideration since these contracts were entered into by SATB in performance of its statutory functions just as much as its Performance Agreement with the Department. We do not agree. That submission is inconsistent with the treatment of the Kingdom Scheme in the *Apple and Pear* case discussed above where certain services provided by the Council were treated as

supplied for consideration although they were clearly undertaken for the purpose of fulfilling the Council's statutory functions. It would, in our judgment, be perfectly possible for a statutory body to be under a statutory duty to act in accordance with given objectives, and to seek to discharge such a duty in whole or in part by making supplies for a consideration.

50. However we also disagree with Ms Hall's submission that the statutory background to SATB's functions is entirely irrelevant. She relied on the reference in article 9 of the Principal Directive to an activity being an economic activity "whatever the purpose or results of that activity" as requiring us to ignore the fact that SATB's purpose in carrying out its functions is to achieve its objectives under the Tourism Act. She submitted that most entities which make supplies for consideration do so pursuant to some governing instrument which both empowers them to undertake activities and constrains them as to the scope or objectives of those activities. Thus companies are empowered and constrained by their memorandum and articles and partnerships by their governing agreements. Although that is clearly true, we do not accept that we must disregard the nature of the governing instruments that operate in this case when applying the Principal Directive to SATB's activities. The nature of SATB's obligations under the Tourism Act is not decisive, but it is a relevant factor.

51. In determining the nature of a supply, regard must be had to the economic realities and to all the circumstances in which the transaction takes place (see *Revenue and Customs Commissioners v Loyalty Management UK Ltd* (Case C-53/09 and C-55/09) [2010] STC 2651 at para 39, and *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2013] STC 784 per Lord Reed at para 38). It is necessary to have regard to the level of generality which corresponds to the social and economic reality (*Dr Beynon and Partners v Customs and Excise Commissioners* [2005] STC 55, per Lord Hoffman at [31]). As explained by Arden LJ in the Court of Appeal in *Esporta Ltd v Revenue and Customs Commissioners* [2014] EWCA Civ 155, the contractual terms are the starting point, and the court has to consider whether those terms reflect the economic and commercial reality of the transaction.

52. We start therefore with the Performance Agreement. The way that the Performance Agreement operated in practice was described in the detailed evidence of Johan Van der Walt, the Chief Financial Officer of the SATB. At first blush, that agreement describes no supply by SATB to the Department or the South African Government, nor anything in the nature of consideration for anything done by SATB. It recites only that the Department has agreed to transfer sums to SATB in accordance with the PFMA to implement international tourism marketing and other activities agreed. It sets out objectives, targets and deliverables, and records the funding that the Department is committed in principle to provide.

53. The labels attached by the parties are not, as the FTT recognised, decisive. But the nature of the obligations undertaken by the parties, seen in the light of the economic and commercial context, is a relevant factor. Ms Hall argued that the Performance Agreement nevertheless had all the hallmarks of reciprocity. She pointed to the fact that there was no obligation on SATB, under the Tourism Act or otherwise, to enter into the Performance Agreement, that payments to SATB were

expressly contingent on it satisfactorily meeting its obligations under the Performance Agreement, that the renewal of the agreement was contingent on such compliance and on SATB meeting targets and that there were provisions for damages for breach of contract, specific performance, termination, legal action, arbitration and the appointment of independent consultants or individuals.

54. Ms Hall accepted that there were circumstances when a statutory body discharging a statutory duty funded by Government could fall outside the VAT system. She argued that this was limited to factual situations where (1) the statutory body did not have the necessary degree of independence from Government; or (2) where there was no legal relationship as was the case in *Tolsma*; or (3) where the services supplied were regulatory rather than supplied within an economic market, as was the case in *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners* [1999] STC 398 ("*ICAEW*"); or (4) where funding was granted regardless of performance and there was no value placed on the services by the parties in their agreement. She argued that here SATB was independent of the South African Government and acted in a professional and commercial way; the Governance Protocol and the Performance Agreement provide the legal relationship; the supply of advertising services clearly takes place in an economic market for such services and the Performance Agreement terms reflect the value that the Government places on tourism as an essential pillar of post-Apartheid prosperity and employment in South Africa. In those circumstances, she argued, there was no reason to treat SATB's activities as anything other than the supply of services for consideration for the purposes of VAT.

55. We agree that absence of any one of those four elements may well prove fatal to the existence of a supply of services for consideration. However, we do not accept that where all those factors are present, there is necessarily such a supply. It is still important to distinguish between the supply of services "for consideration" on the one hand and a situation where Government funding is provided to a body in order for it to perform its function but where the services are not provided to the funder in return for that consideration on the other hand. That is the distinction which was at the heart of the *Apple and Pear* decision and which is at the heart of this case. Further, we agree with the FTT that the setting of performance targets and the fact that the continuation of some or all of the funding is dependent on the body meeting set targets is no longer the exclusive preserve of commercial contracts for the supply of services: see paragraphs 89 and 257 of the Decision. Many Governments seek to import those concepts from the private sector into the public sector in order to improve the efficiency and accountability of public sector bodies.

56. In our judgment, on its own the Performance Agreement falls far short of demonstrating the degree and nature of reciprocity required to constitute the payments made by the Department to SATB as consideration for supplies by SATB. There is a link between the funding and the performance by SATB of its functions in accordance with the agreed business plan and objectives, but that is consistent with an arrangement of negotiated funding. There is nothing in the agreement to deflect away from that analysis towards a transaction of supply. The linkage is not one of mutual exchange of supply and consideration for that supply.

57. The economic and commercial context supports that analysis. It starts with the Tourism Act, and its high-level provision for the objectives and purpose of SATB. It provides for the means of funding of SATB, including the appropriation of monies by the South African Parliament. There is a statutory obligation of SATB to expend those monies in performance of its objectives.

58. The Tourism Act itself provides a framework for a funding arrangement as between the Government and SATB. SATB is under a duty, subject to being adequately funded, to perform according to its objectives. The fact that the funding is then determined by an iterative process involving negotiation to achieve a consensus on the detail of the business plan does not result in there being the necessary reciprocity or mutuality to convert a funding arrangement as contemplated under the Tourism Act into a transaction of the supply of services for a consideration.

59. We accept Ms Hall's submission that the relationship between SATB and the South African Government is not exclusively defined by the Tourism Act. But the whole tenor of the Tourism Act, the PFMA, the Governance Protocol and the Performance Agreement is one of the funding of SATB's activities. We regard that as a different legal relationship from the one contemplated by the reference to supply of services for a consideration in the VAT legislation. The Performance Agreement operates not to record the supply of services by SATB for a consideration, but to crystallise the funding at the level to support the detailed programme of activities. Ms Hall argued that reciprocity in terms of subjective agreement as to the value of the services was the material factor. We agree that is a relevant factor, but there is a difference between agreeing the value of something for the purpose of providing the appropriate level of funding to enable that thing to be carried out, and agreeing the value of a service for the purpose of paying for that service. The mere act of agreeing a value is not therefore decisive of the required mutuality. In this case the negotiation and agreement as to value was a function of the oversight of the arrangements by a funder, and not to provide a monetary exchange for a service provided.

60. The fact that the South African Government received a benefit from the activities of SATB is relevant, but again not decisive. Although the Government received something of value to it, that value was received as an incidental outcome of the ability of SATB to perform its statutory duties by virtue of the funding it had received. There was no relevant reciprocity and accordingly no direct link between the payment and the value received by the Government.

61. In seeking to distinguish the facts of this case from that of a grant from a third party for a project to be undertaken, Ms Hall submitted that in contrast to the position of a grant, the South African Government wishes to ensure that the activities that are carried out by SATB are performed, and that the Government would either have to perform those activities itself or arrange for the outsourcing of those activities to a third party. Such an outsourcing would be a taxable supply by the provider of services to the Government.

62. Accepting that hypothesis, it does not in our view follow that the arrangement between the Government and SATB must be regarded in the same way. The

Government has made a choice as to the way its objectives regarding tourism are met. That choice could have been to enter into an outsourcing arrangement under which the counterparty would have supplied services to the Government for a consideration. But that was not the choice made by the Government. The choice actually made was to establish a body, publicly-funded, to carry out the various activities. The fact that the Government could have achieved its objective in another way, by paying consideration for supplies of services, cannot convert a funding arrangement into a supply for consideration.

63. Nor can any resort be made to fiscal neutrality. The arrangement between SATB and the Government is a different arrangement to that of supply. It is not a breach of fiscal neutrality for different outcomes to arise in different circumstances.

64. On that basis, applying the principles of EU law we have described, we conclude that, on the facts of this case, the arrangements between SATB and the South African Government did not amount to a supply of services by SATB to the South African Government for a consideration. There was no relevant reciprocity, and no direct link of the required nature between the funding of SATB and the activities carried out by SATB. The arrangement was one of funding, with appropriate provision to ensure performance, and not a transaction of the supply of services.

65. We consider the approach we have adopted to be the principled one. We were referred to a number of decisions of the VAT tribunal in which they considered the provision of services in circumstances that were similar to the current case. Since we derived only limited assistance from these, we shall mention only two.

66. The first is *Netherlands Board of Tourism v Customs and Excise Commissioners*, no 12935, 22 December 1994. In that case NBT was a non-profit-making organisation established by the Government of the Netherlands. Part of its funding derived from a grant from the Government. One of the issues was whether some of the supplies made by NBT were to the Government but were not taxable supplies because there was no direct link between the services supplied and the consideration received.

67. The tribunal found, on an analysis of the activities of NBT, that some of its supplies of public relations and advertising and promotion services (which the Dutch Government could have commissioned from an outside agency) were made by NBT to the Government. That then gave rise to the issue of consideration and direct link. Having discussed the opinion of the Advocate General and the judgment of the ECJ in *Apple and Pear*, the tribunal took the view that *Apple and Pear* could be distinguished from the facts of NBT's case, on the following basis:

(a) the charge paid by the Government to NBT was not mandatory;

(b) the charge related to the services supplied;

(c) in NBT's case there was a transaction, namely that NBT would carry out the services of promoting Dutch tourism, and the Government would pay for those services;

(d) in NBT's case there was a consensual relationship between NBT and the Government, and the Government had control over NBT's activities;

(e) the Dutch Government benefitted directly from the activities of NBT;

(f) in the NBT case, there was a transaction to which the payment by the Government could be related, and the Government could point to services specifically supplied to them;

(g) there was a relation between the level of benefits and the amount paid by the Government;

(h) the charges were not imposed by statute but by contract;

(i) whereas in *Apple and Pear* it was not possible to identify what services the Council provided for each of a large number of growers, in NBT it was only the Dutch Government which provided funding in return for the services received.

68. It can readily be appreciated that SATB would wish to place reliance on the reasoning of the tribunal in *NBT*. The FTT accepted the submission of Mr Singh that *NBT* could not be relied upon on the question whether a statutory body receiving government funding to carry out its statutory functions because the VAT tribunal did not consider the issue. However, we would say simply that *NBT* was a case decided on its own particular facts. The significant feature of *NBT* is the finding by the tribunal that some of NBT's supplies were made to the Dutch Government, before considering the question of whether those supplies were taxable supplies or not. Having decided that NBT was making such supplies, it is not difficult to understand the conclusions of the tribunal on the questions of direct link and consideration.

69. This case is different. There is no finding that any supply was made by SATB to the South African Government. The finding is that no services were supplied, and nothing was done for a consideration on the EU law principles.

70. The second VAT tribunal decision is *Turespaña (Spanish Tourist Office) v Customs and Excise Commissioners*, no 14568, 5 November 1996. In that case a different conclusion was arrived at from that in *NBT*. The status of Turespaña was established under a Royal Decree. It was an autonomous organisation of a commercial nature, attached to the Spanish Ministry of Transport, Tourism and Communication through the Secretariat General for Tourism. It was responsible for carrying out Government policy in respect of the promotion of tourism abroad, in accordance with instructions it received from the Secretariat General for Tourism. It was funded by transfers and subsidies granted to it annually in the State General Budget.

71. For the purpose of the budget, Turespaña prepared estimates taking account of projected external income and estimated expenditure. Those estimates were refined following negotiation. The final budget was approved by the Spanish Parliament. Turespaña's accounts were audited both internally and externally.

72. The tribunal found that, in carrying out its duties, Turespaña was discharging its statutory duties. The Spanish Government could control its activities; its functions could be altered by decree at any time and its resources distributed accordingly.

73. In contrast to what the tribunal had found in *NBT*, in *Turespaña* the tribunal noted that the nature of the payments made by the State and the activities performed by Turespaña appeared far removed from the usual concept of supplies. The tribunal found that the concept of annual appropriations as consideration for supplies was unrealistic. The unquestionably tough bargaining could not constitute the necessary consensual element for a supply for consideration in VAT terms.

74. The tribunal went on to find that, even if the budgetary payments might otherwise be payments for services, the necessary direct link would be absent. There was no evidence that any particular level of services was bought or that defined activities were specified in each budget.

75. The tribunal concluded that there were no supplies by Turespaña to the State, no consideration was received by Turespaña as a quid pro quo for such supplies and there was no direct link between the payments from the budget and such activities.

76. Although there was argument before the FTT on whether *Turespaña* was correctly or wrongly decided, in our view that is nothing to the point in this case. *Turespaña*, like *NBT* before it, was a case on its own facts. Whilst we accept that comparisons are inevitable with cases that have reached the same conclusion as that a party wishes to arrive at in its own case, and distinguishing features will be equally important to an opposing party, where no principle is to be discerned from a decided case the process is ultimately redundant.

77. We have accordingly reached the same conclusion on this issue as the FTT, albeit that we have expressed our reasoning rather differently. It is clear, however, that the FTT based its own reasoning on an analysis that the arrangements between SATB and the South African Government were of a funding character and not in the nature of a supply for a consideration. The FTT said as much at [281] of its decision.

78. However, where the FTT expressed its view as a matter of principle, rather than of analysis of the facts and circumstances before it, we consider that it fell into error. Thus, looking at [266] of the FTT's decision, we would not agree that, as a matter of principle, the mere fact that the funds SATB received had to be used by it to carry out its statutory purpose necessarily meant that reciprocity would be absent. It could be the case that a statutory purpose may be achieved by entering into reciprocal arrangements amounting to a supply for a consideration. It was just that in these circumstances that was not the case.

79. We also agree with Ms Hall that the FTT's finding that "earmarked funds" cannot be consideration (FTT decision, at [282]) cannot be supported. There is no such principle as a matter of law. Nor was the FTT right to say, as it did at [282], that the "*receipt* of funds which can only lawfully be used for a specific purpose cannot be consideration for a supply", or at [284] that earmarking funds for a particular use is the antithesis of commercial activity. The FTT appears to have based this general statement of principle on an analysis of the arrangements between SATB and the Government as a form of trust, with SATB as the trustee, receiving funds earmarked for a particular purpose and being required by law to use those funds for that purpose. In support of its trust analysis the FTT referred in particular to the requirement, under clause 5.5 of the Performance Agreement, that uncommitted funds be refunded to the Government. We regard this as a false analogy, and one that could not be objectively reached taking account of the economic realities and commercial circumstances of this case.

Taxable person acting as such

80. Our conclusion that SATB made no supplies for consideration to the South African Government means that aspect of the appeal must be dismissed. We shall therefore deal quite shortly with the findings of the FTT on the question whether, in connection with its arrangements with the South African Government, SATB was acting as a taxable person as such. The FTT found that, irrespective of any question of "direct link", SATB was not a taxable person acting as such when receiving Government funding to carry out its statutory duties as detailed in the Performance Agreement (FTT decision, at [258]).

81. The starting point for this finding of the FTT is to be found at [232] of its decision, where it expressed the view that a statutory body, when receiving Government funding, could in no way be seen as carrying on an economic activity as, in contrast to an independent entity to which the Government has outsourced a task, it could not do so for profit.

82. This analysis sits uncomfortably with the FTT's own statement at [169] when, citing what Beldam LJ had said in *ICAEW* in the Court of Appeal [1997] STC 1155, at p 1166c, it acknowledged that it was well established that supplies can be supplies even if they are made without realising profit, or even having the intention of realising a profit. But we think it can be explained by the fact that the FTT was focusing on the mere receipt of funds by SATB, and not on the activities of SATB in performance of its statutory duties. That, we believe, can be deduced from the references to receipt of funds in [233] to [235] of the FTT's decision. In particular, at [235], the FTT contrasted the discharge by SATB of its statutory functions, which it allowed could be an economic activity, with the receipt of Government funding by SATB, which the FTT found could not.

83. The question whether there is economic activity should not focus on the nature of the funding, but on the characteristics of the funded activity itself. We do not accept that it is right to try to treat the receipt of funds from the Government as something separate from the uses to which those funds are put by the taxable person

and then to ask whether receipt of funds in isolation is an "economic activity". The receipt of funds is not in itself an activity distinct from the general activities of the entity using those funds – the receipt of funds is part and parcel of the activity carried out by SATB in performance of its statutory functions.

84. The difficulty, if we may respectfully say so, has arisen because of the conflated view taken by the FTT of the questions before it. That conflation is evident from [277] of the FTT's decision, where, in dealing with the question of economic activity, it described the question as being whether the payment was consideration for a supply. It then went on to find that the funding of a statutory body by the Government was simply not an economic activity, even where the statutory body and the Government agree a document which sets out the services and the level of funding, and that consequently the funding could not be consideration for a supply.

85. We consider this logic to be circular and flawed. It seeks to determine whether there is consideration for a supply by reference to whether what is carried on is an economic activity. Those questions are, however, distinct. If there had been a supply for consideration, there would then arise the question whether it was a supply in the course of an economic activity carried on by SATB. SATB is not prevented from carrying on an economic activity, either because it is a statutory body (see *National Water Council v Customs and Excise Commissioners* [1979] STC 157) or because it is discharging its statutory functions; so much was recognised by the ECJ in *Hutchison 3G UK Ltd and others v Customs and Excise Commissioners* (Case C-369/04) [2008] STC 218, at para 42 of the judgment. The question whether SATB was carrying on an economic activity would therefore fall to be considered in relation to the particular supplies identified as having been effected for a consideration. That was the way the House of Lords approached the issue in *ICAEW*.

86. The relevance of economic activity in this case is that, according to article 2 of the Principal VAT Directive, in order that a transaction of the supply of services for a consideration can be a taxable supply, it must be made by a taxable person acting as such. That, by article 9, means that the person must be acting independently and be carrying out an economic activity. The concepts of taxable transaction and taxable person are, as we have described, separate concepts even if there may be some overlap in the analysis required for each.

87. In a case where there is consideration for a supply, there may remain a question whether the person making that supply has acted as a taxable person in making that particular supply. There may be an issue as to the capacity in which that person is acting, such as whether that person is acting independently; the paradigm example of where that will not be the case is if the person is acting in the capacity of an employee. There may also be a question whether the particular supply falls into the sphere of economic activity at all, so that even though there might be the necessary reciprocity to create a supply for a consideration, such a supply cannot be a taxable supply for the purpose of art 2.

88. There can be no hard and fast rule for determining which concept is the primary one for examination. That will depend on the circumstances of an individual case. In

ICAEW in the House of Lords [1999] STC 398 for example, the question whether certain regulatory activities, comprising the issue of licences for the carrying on of certain types of business, and the charging of fees to those seeking to be licensed, were taxable supplies was determined by reference to whether that activity was an economic activity. As Lord Slynn put it (at p404b):

> "For the purposes of the Sixth Directive, it is thus not sufficient that what is done can be described as an activity of the professions for the purposes of art 4(2), nor that it was a supply of services for consideration for the purposes of art 2(1). It must still be an economic activity."

89. In the *Hong Kong Trade Development Council* case, the issue of taxable person was put at the forefront. Although the Development Council was funded by a fixed annual grant from the Hong Kong Government and from the proceeds of a charge on the value of Hong Kong imports and exports, the nature of those payments was not in issue before the Court. The basis on which the questions were put was that the Development Council's activity consisted exclusively in providing services for no direct consideration. Since none of those activities could constitute taxable transactions, the Development Council could not be a taxable person. Thus, in *Hong Kong Development Council*, in contrast to *ICAEW*, the question whether the Development Council was a taxable person logically followed from the fact that none of the activities of the Development Council were taxable transactions. Accordingly, a secondary question, whether input tax would not be deductible on the basis that the relevant goods and services would not have been used in the making of taxable supplies, was not addressed by the Court.

90. These cases demonstrate that the issues to be determined will depend on the nature of the particular case. In this case, unlike that of *Hong Kong Development Council*, the threshold question is whether a range of activities of SATB (including the arrangements with the South African Government, joint marketing activities and others) involve the making of supplies for a consideration. The status of SATB as a taxable person or as a taxable person acting as such logically follows the examination of that question.

91. That, we consider, is the correct approach in this case. Adopting it avoids the circularity that can be found in the FTT's decision on economic activity. It is nothing to the point that the mere receipt of funding by SATB was not an economic activity. The premise for the FTT's description of the arrangement as a mere receipt is that there is no supply by SATB for a consideration. Accordingly, the reason the arrangements between SATB and the South African Government would not constitute a taxable supply if carried on in the UK is because in that respect SATB made no supply of services for consideration rather than because it was not entering into those arrangements as a taxable person.

Conclusion in relation to SATB's arrangements with the South African Government

92. Accordingly, for the reasons we have given, which do not coincide precisely with those given by the FTT, we would dismiss this appeal, so far as it relates to the arrangements between SATB and the South African Government.

Other activities of SATB

93. That conclusion does not entirely dispose of the issues on this appeal. There remains the question of the correct proportion of input tax to be recovered by SATB in respect of supplies of services to persons other than the South African Government.

94. In its decision the FTT concluded that both incidental activities (such as the sale of know-how or images, or the sub-letting of excess property) and joint marketing initiatives, such as the partnership with the Emirates airline, were taxable supplies, or would be if carried on in the UK. Although we do not agree with the FTT that the absence of "earmarking" of funds has any role to play in such a conclusion, we have no reason to doubt this conclusion. We have, in particular, rejected Mr Singh's argument that such activities could not be taxable supplies because they were undertaken in discharge of SATB's statutory duty.

TBSCA funding

95. That leaves the question of the TBCSA funding. In that respect, although the FTT found that SATB was obliged, when promoting South Africa, to favour the businesses which collected the levy from their customers, it found it less easy to see a link between the amount of levy paid to SATB to a particular level of service provided to the levy collectors.

96. The FTT decided (at [300] of its decision) that in respect of the TBSCA levy, SATB no more made supplies for consideration than it did in respect of the funding from the South African Government. However, in making that finding it relied upon the "earmarking" analysis that we have concluded was a wrong approach. That was the basis of the FTT's decision in this regard.

97. That in our view was an error of law, and we need therefore to consider if the FTT's decision in this regard should be set aside.

98. The memorandum of understanding ("MOU") does, as the FTT observed, share certain characteristics with the Performance Agreement. Thus, it is expressed in the form of a commitment on the part of TBSCA and TOMSA to support SATB's project of aiming to increase the number of tourists as set out in its business plan by the provision of "funding". The essential difference is that, unlike the Performance Agreement, the MOU provides a quid pro quo for the payments, in the form of the TOMSA levies, received by SATB.

99. Thus, the MOU provides for specific benefits to be made available to TOMSA levy collectors, including notice of joint marketing agreements; preferential profiling for TOMSA levy collectors that are graded; availability of SATB's offices and

infrastructure and assistance in setting appointments with key stakeholders, buyers and operatives; assistance to TOMSA levy collectors in setting up meetings with buyers and industry players at trade shows; preference to TOMSA levy collectors for participation in exhibitions, both in South Africa and internationally; preference in respect of services to be provided to overseas visitors and SATB sponsored familiarisation trips; opportunity for TOMSA levy collectors to address SATB's call centre staff on products and services; making available TOMSA levy collectors' marketing and promotional material through SATB's overseas offices.

100. In our judgment, the MOU demonstrates a reciprocity, in terms of services supplied by SATB to TBSCA and TOMSA, that is lacking in the Performance Agreement. Although the FTT was concerned to identify a particular level of service provided to the levy collectors, that in our view was not the right question. The question is whether services were provided to TOMSA and/or TBSCA, and whether the payments made, in the form of the onward payment to SATB of the TOMSA levies, were consideration for those services. In our view the answer to both is yes. It is evident that TOMSA and TBSCA wanted to obtain the availability of the privileges agreed to be granted by SATB to the TOMSA levy collectors, and that this was the quid pro quo for the payments agreed to be made.

101. Nothing in the context or background to the MOU militates against this conclusion. Although it is the case that SATB was obliged under the Tourism Act to use its funds from all sources to defray expenditure, that obligation does not detract from the reciprocal nature of the MOU.

102. Furthermore, there can be no doubt that the services supplied by SATB in return for the TOMSA levies were an economic activity of SATB. As we have described, the fact that SATB was a statutory body, and was discharging its statutory functions in part by entering into the arrangements with TBSCA and TOMSA, does not prevent those activities of SATB from being economic activities. The position of SATB is a long way from that of the ICAEW in relation to its regulatory function; in the case of SATB, the activities in question were in a real sense trading or commercial activities.

103. On an objective view of the economic and commercial circumstances, we conclude that the payments made by TOMSA and TBSCA under the MOU are consideration for supplies which, if made in the UK, would be taxable supplies by SATB.

104. We therefore set aside the decision of the FTT in this respect and re-make the decision accordingly.

Reference to the CJEU

105. We were invited by Ms Hall, in case we could not confidently resolve this appeal in SATB's favour, to refer questions to the Court of Justice under art 267 of the EC Treaty. That submission was based, at least in part, on issues said to arise from the decision of the FTT.

106. We decline to make a reference. In our view the principles which fall to be applied in this case are clear and require no further elaboration from the CJEU. We are not in the position of finding that we cannot reach our conclusion with complete confidence.

Decision

107. It follows, for the reasons we have given, that:

(1) we dismiss SATB's appeal in respect of its arrangements with the South African Government under the Performance Agreement;

(2) we allow SATB's appeal in respect of the TOMSA/TBSCA levies; and

(3) we make no reference to the CJEU.

MRS JUSTICE ROSE **JUDGE ROGER BERNER**

UPPER TRIBUNAL

RELEASE DATE: 25 JUNE 2014